

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-216924, B-217057 DATE: March 18, 1985
MATTER OF: Sess Construction Co.

DIGEST:

1. Section 401 of the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, 98 Stat. 3082, Oct. 30, 1984, prohibits the Small Business Administration (SBA) from establishing any exemption from requirement for referral of nonresponsibility determinations. That section of the law was effective upon enactment and therefore all such determinations must be referred to SBA for review under the SBA's Certificate of Competency procedures.
2. Where bidder includes in its bid statement that its price for option periods was "plus rate of inflation, fuel, labor and gravel," and where IFB stated that the option years would be evaluated for award, bid was properly rejected for failure to offer firm, fixed price.
3. The protester has the burden of proving bias or favoritism on the part of the procuring officials. Where there are conflicting statements of fact and the protester's position is supported by no other evidence, we conclude that the protester has failed to meet its burden.

Sess Construction Co., protests the rejection of its bids under invitations for bids (IFB) Nos. R8-7-84-65 and R8-7-84-66 issued by the United States Forest Service for road maintenance work in the Biloxi Ranger District. The work under the IFBs consisted of blading aggregate surfaced roads, blading nonsurfaced roads and cleaning and reshaping ditches. Bids for both IFB's were opened on September 24, 1984 and covered maintenance work for a 1-year period with two 1-year options. Sess contends that the Forest Service's rejection of its bids

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was improper and has alleged that the Forest Service has unfairly discriminated against the firm.

For the reasons set forth below, Sess's protest under IFB No. R8-7-84-65 is sustained and its protest under IFB No. R8-7-84-66 is denied.

IFB No. R8-7-84-65

Six responses to the IFB were received by the Forest Service. Sess submitted the apparent low bid of \$8,392 per year. This price was approximately 50 percent below the government estimate of \$16,612 and because of this, the Forest Service requested that Sess verify its bid price. In addition, since Sess had not held any previous Forest Service road maintenance contract, the Forest Service requested a demonstration of the equipment which would be utilized.

Sess verified its bid price as the price which was intended. Thereafter, a demonstration of Sess's equipment was conducted. Based on that demonstration, the Forest Service determined that some of Sess's proposed equipment would not perform the work required by the specifications and that providing alternate equipment to perform the work would pose a serious financial hardship on Sess. On this basis, the Forest Service found Sess nonresponsible and by letter dated November 5, 1984, informed Sess that its bid was rejected. On November 6, the contract was awarded to Mr. Bobby Hunt in the amount of \$14,535.

Sess is a small business concern. The Forest Service, however, did not refer the matter of Sess's responsibility to the Small Business Administration (SBA) for review under the SBA's Certificate of Competency (COC) procedures. Sess's bid price was less than \$10,000 and the Forest Service states that, under current SBA regulations, it is within the contracting officer's discretion as to whether a referral should be made when the contract value is less than \$10,000. See 13 C.F.R. § 125.5(d)(1984). The Forest Service argues that its nonresponsibility determination was reasonable and that, under the circumstances, it was not required to refer the matter to the SBA for further review.

The record indicates that Sess applied to the SBA for a COC. Due to the recent enactment of the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, 98 Stat. 3082, October 30, 1984 (hereinafter referred to as the Act), the SBA is no longer

empowered to establish any exemption from referral. Although the regulatory provision in effect at the time the contract was awarded did state that it was within the contracting officer's discretion to refer a nonresponsibility determination when the contract value is less than \$10,000, section 401 of the Act, which was effective immediately upon enactment, provides that all nonresponsibility determinations must be referred to the SBA for review under the SBA's COC procedures, as long as the affected small business concern wishes its application to be considered. The SBA advised the Forest Service of this development and that notwithstanding the dollar value of this contract the matter of Sess's responsibility should have been referred to the SBA. Subsequently, the SBA considered Sess's application and by letter dated December 18, 1984, issued a COC.

In view of the change in the law and SBA's determination to issue a COC in this matter, we find that the Forest Service's award under this IFB cannot be upheld. Although we recognize that the contracting officer's actions in not referring the matter to SBA may have conformed with published SBA regulations at the time the determination was made, the legislative history concerning the enactment of section 401 clearly indicates that the provision was effective immediately upon enactment and was designed to ". . . overturn the agency's (SBA's) arbitrary regulation relating to the imposition of a dollar threshold for small business access to the certificate of competency program." S. Rep. No. 98-523, 98th Cong., 2nd Sess. 55 (1984). Thus, under the law, the Forest Service was required to refer the nonresponsibility determination to SBA.^{1/}

Under the circumstances, and since SBA has issued a COC which found Sess to be fully capable of performing this contract, we recommend that the current contract be terminated for the convenience of the government and an

^{1/} This matter should have been referred even under the SBA regulation in effect at the time the contract was awarded. The contract value is determined by the awardee's bid price and since that amount exceeded \$10,000, the Forest Service was required to refer the matter. Columbus Jack Corp., B-211829, Sept. 20, 1983, 83-2 CPD ¶ 348.

award made to Sess. While the SBA has informally advised our Office that section 125.5(d) will be revised to eliminate the exemption from referral when the contract value is less than \$10,000, we note that more than 4 months has elapsed since the enactment of the statute and the regulation has not yet been changed. Accordingly, by separate letter, we are advising the SBA to notify contracting agencies of the change in the law pending the publication of the revised regulation.

The protest under IFB No. R8-7-84-65 is sustained.

IFB No. R8-7-84-66

In its response to this IFB, Sess stated that its price for the option periods of the contract was "plus rate of inflation, fuel, labor and gravel." The Forest Service concluded that the statement qualified Sess's bid and the bid was rejected as nonresponsive.

We find that the Forest Service's rejection of Sess's bid was proper. Bid responsiveness requires an unequivocal offer to provide without exception exactly what is required at a firm-fixed price. Medi-Car of Alachua County, B-205634, May 7, 1982, 82-1 C.P.D. ¶ 439. If a bidder attempts to qualify its bid to protect it against future price changes, the bid must be rejected as nonresponsive. Joy Manufacturing Co., 54 Comp. Gen. 237 (1974), 74-2 C.P.D. ¶ 183; Federal Acquisition Regulation, 48 C.F.R § 14.404-2(d)(i) (1984)). We have held that only material available at bid opening may be considered in making a responsiveness determination and that post-opening explanations by the bidder cannot be considered. United McGill Corporation and Lieb-Jackson, Inc., B-190418, Feb. 10, 1978, 78-1 C.P.D. ¶ 119.

Here, Sess's bid price for the option years was clearly conditioned on the rate of inflation, as well as the cost of labor, fuel and gravel. The IFB stated that the option years would be evaluated for award purposes and as a result of the statement included with its bid, Sess's total bid price could not be determined. Although Sess suggests that the deficiency be waived as a minor informality, Sess did not submit a firm, fixed price as required in advertised procurements and the Forest Service was justified in rejecting Sess's bid on this basis.

Remaining Allegations

Sess has raised additional charges which in Sess's view, demonstrate that the Forest Service acted in a biased manner towards Sess. Sess complains that the Forest Service improperly excluded Sess from the bidder's mailing list and that Sess was unfairly denied a pre-contract tour. In addition, Sess alleges that the contractors currently performing are not complying with the requirements set forth in the IFBs.

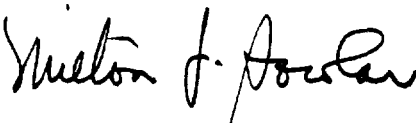
With respect to the mailing list, the Forest Service states that Sess was added to the list and should have been receiving copies of the solicitation. The Forest Service states that it is possible that an administrative error was made in mailing the invitations but that it is the Forest Service's policy to include all interested bidder's on the mailing list and there was no intention to exclude Sess. In addition, the Forest Service states that its personnel were present for a pre-contract tour at the location which was specified and that Sess must have gone to the wrong place. The Forest Service argues that Sess has been treated fairly and that there has been no discriminatory action taken towards the firm.

Based on the record, we cannot conclude that Sess was treated unfairly by the Forest Service. In this regard, we note that the protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. Mechanical Equipment Company, Inc., B-213236, Sept. 5, 1984, 84-2 C.P.D. ¶ 256. Furthermore, where there are conflicting statements of fact and the protester's position is supported by no other evidence, we conclude that the protester has failed to meet its burden and we will accept the agency's position. T.E. DeLoss Equipment Rentals, B-214029, July 10, 1984, 84-2 C.P.D. ¶ 35. Moreover, where the subjective motivation of an agency's procurement personnel is being challenged, it is difficult for a protester to establish--on the written record which forms the basis for our Office's decision in protests--the existence of bias. Joseph Legat Architects, B-187160, Dec. 13, 1977, 77-2 C.P.D. ¶ 458. In view of the Forest Service's explanations regarding Sess's allegations, we find that the record does not support a finding of bias or unfair action towards Sess.

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Finally, we note that Sess's complaint concerning the performance by the current contractors involve matters of contract compliance and administration, which are the responsibility of the contracting agency, not our Office under our bid protest function. Lion Brothers Company, Inc., B-212960, Dec. 20, 1983, 84-1 CPD ¶ 7.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

for 
Comptroller General
of the United States